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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1308

ASSOCIATED GAS DISTRIBUTORS,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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By referring to several *ipse dixit* statements from the decision below and with a salvo of well-settled oft-repeated rubrics of judicial review, the Briefs in Opposition[1] relegate

[1] This Reply Brief responds to Briefs in Opposition filed by the Federal Power Commission (FPC or Commission), Mobil Oil Corporation (Mobil) and Shell Oil Company *et al.* (Shell).

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"reasoned consideration" to an empty exhortation of form over substance, circumvent the explicit "substantial evidence" requirement of the Natural Gas Act and this Court and fail even to recognize the salient distinctions between the instant case and the *Permian* and *Mobil Oil* cases. Petitioner Associated Gas Distributors (AGD) submits that these responses are patently inadequate, *post hoc* rationalizations of enormous rate increases which serve no purpose cognizable under the Natural Gas Act.

1. There is, of course, no question that the reviewing court *must* "assure itself that the Commission has given reasoned consideration to each of the pertinent factors" cited by this Court in the *Permian* case. Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968). This the Fifth Circuit intended to do, otherwise it could not have affirmed the Commission. Indeed, the court's discussion of the standard of review underscored this particular obligation. *See* 520 F.2d at 1071. However, after noting its responsibility, the court candidly stated:

> Opinions 699 and 699-H assert many factual conclusions and regulatory justifications without explicating for this Court the factual predicates or assumptions upon which such decisions are based.
>
> * * *
>
> Perhaps one reason the Commission has continued to flounder in the sea of area regulation is its failure to assess the consequences of its various policies. 520 F.2d at 1071-72.

and;

> For over fourteen years the Commission has been experimenting in area rate regulation and yet it still "supports *many* of the *essential elements* of its new national rate order with little more than *ipse dixit*. *Id.* (Emphasis added).

The court's discussion concerning the permissibility of a national rate under the Natural Gas Act is equally illuminating:

> Without any such quantification [*i.e.*, increase in price will necessarily increase supply], it is simply impossible for this Court to determine if the "end result" will maintain an "adequate supply in the public interest" or not. Going on past experience for area rates the answer *appears to be in the negative*, and it is in part for this reason that the FPC has abandoned area rates. *Id.* at 1074 (emphasis added).

In regard to renewal contracts, the tenor is evident once again:

> The FPC thus applied the rate functionally to "old" gas rather than on a cost-related basis, *hoping* that a higher uniform rate will help alleviate the current severe shortage. The FPC *believed* . . . *Id.* at 1077 (emphasis added).

If there is substance to a reviewing courts' "reasoned consideration" responsibility, the foregoing excerpts from the opinion below raise serious questions as to whether that responsibility was discharged in this case.

2. Although the Commission Brief (p. 13) correctly states AGD's argument "that there is no evidentiary basis to support the allowance of the national rate for sales under new contracts replacing long-term contracts that have expired by their own terms," its rebuttal is limited to yet another restatement from the Fifth Circuit opinion. Once again, the Commission is attempting to "hide the pea." AGD agrees that there is a gas shortage and that "a massive commitment of new funds to exploration and development is necessary to alleviate the shortage." But the issue is that there is absolutely *no evidence* that the revenue generated through the treatment of renewal contracts as "new gas" sales will be used to increase natural gas supplies generally or *interstate* natural gas supply in particular. Neither the Commission order, the opinion of the court below nor the

Briefs in Opposition[2] cite *any* evidence that these dollars will be either "functionally applied," or cost-justified.

The Fifth Circuit characterized the "evidence" well:

> The Commission *reasoned* that application of the new, higher rate to "old" gas as primary contracts expire will generate added funds for greater exploration. The FPC thus applied the rate functionally to "old" gas rather than on a cost-related basis, *hoping* that a higher uniform rate will help alleviate the current severe shortage. The FPC *believed* that by requiring an old contract to be renegotiated before the new rate is recoverable, the pipeline *might* be able to negotiate for additional acreage dedication to interstate commerce, or exploration and development activity on previously dedicated acreage or other concessions for the price increase. 520 F.2d at 1077 (Emphasis added).

The proper standard consistently applied by this Court and set forth in the Natural Gas Act is: "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. §717r(b). The Act does not say "if supported by hopes, beliefs or general expertise." It does not give the Commission license to play a $2.6 billion *hunch*. Absent *some* evidence that revenues of these proportions *will* yield the hoped-for result, the pricing of renewal contracts at the new gas rate cannot be squared with the consumer protection purposes of the statute.

3. Finally, the Commission (p. 15) and Mobil (p. 15, note 6) assert that the "use of price functionally to encourage exploration and development, and specifically its determina-

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[2]Mobil's Brief (p. 15) cites the availability of cost data on "rejuvenating old wells to extend their productive life" as if it were support for the pricing of renewal contracts. But the record shows that this cost was stipulated at 0.20 cents per Mcf (Calco App. C-85), a small fraction of the 23 to 30-cents per Mcf increases permitted by the renewal contract pricing policy challenged by AGD.

tion that the burden of future exploration and development should be borne in part by consumers of flowing gas was upheld by this Court in *Mobil*. . . . 417 U.S. at 319-321." This assertion is inaccurate and misleading. It overlooks the fundamental distinction between the rate orders in *Mobil* and that presented here. In *Mobil*, the Court approved a rate design wherein the functionality of price to encourage exploration and development was created by means of *contingent escalation and refund credit provisions*. 417 U.S. at 320-21. Thus, *Mobil* presented a situation in which the Commission provided a reasonable assurance that the public interest would be protected, i.e., "that the refund workoff credits and contingent escalations could provide opportunity for increased prices that would help in generating capital funds and in meeting rising costs, *while assuring that such increases would not be levied upon consumers unless accompanied by increased supplies of gas.*" *Id.* at 318 (Emphasis added).

The increased gas supply assurance which supported the increase in flowing gas prices in *Mobil* is missing here. Instead of providing this assurance, the Commission has chosen to rely on the pipelines to guard the public interest by securing additional gas supply concessions when "negotiating" renewal contracts. The Commission simply had no basis for this reliance. Given the acute gas shortage on most interstate pipelines and the pipelines' right to pass on the producers' charges to their customers, the pipelines ability and incentive to bargain for additional gas is a hope which ignores reality. *See F.P.C.* v. *Texaco, Inc.*, 417 U.S. 380, 397-399.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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